

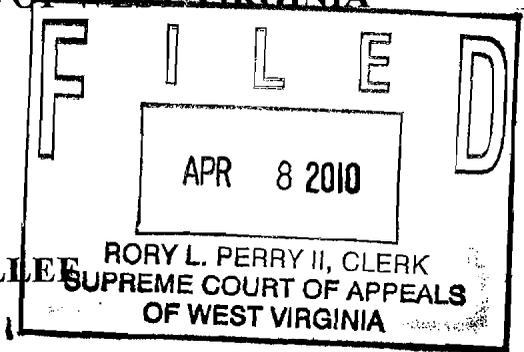
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

No. 35439

**LYNDA YOUNG,  
PLAINTIFF BELOW, APPELLEE**

**VS.**

**BELLOFRAM CORPORATION, D/B/A MARSH  
BELLOFRAM CORPORATION, AND JOSEPH COLLETTI,  
DEFENDANTS BELOW, APPELLANTS**



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HONORABLE ARTHUR M. RECHT, JUDGE  
CIRCUIT COURT OF HANCOCK COUNTY  
CIVIL ACTION No. 06-C-55R

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## I. INTRODUCTION

Lynda Young's brief to this Court misstates the evidence presented at trial in an attempt to mislead. Once the plaintiff's characterizations are compared with the actual testimony and Judge Recht's decision, it is abundantly clear that (1) there was no evidence that the only comparison employee, Donnie Shuman ("Mr. Shuman"), allowed his subordinates to engage in the persistent and outrageous acts of racial, ethnic, and sexual harassment allowed by Ms. Young and (2) there was no evidence that the reasons given for the termination of Ms. Young's employment were pretextual. Accordingly, this Court should reverse Judge Recht's decision and direct entry of judgment for the defendants.

The testimony at trial, including Ms. Young's own, established that (1) racial, ethnic, and sexual harassment repeatedly occurred on Ms. Young's watch; (2) Ms. Young was aware of this harassment; and (3) Ms. Young ignored it and told others to do the same. Based on this information and upon the advice of multiple women over 40 years of age, the defendant, Joseph Colletti ("Mr. Colletti"), who himself was 53 years old, fired Ms. Young, who was replaced by Chris Smith ("Ms. Smith"), another woman over the age of 40.

There is no evidence substantiating the plaintiff's claim that younger male employees were similarly situated yet treated differently. First, the record lacks any proof that Mr. Shuman – the only comparison employee used by Judge Recht – was aware of similar misconduct during his tenure as supervisor. Rather, the testimony was that Mr. Shuman, who was in the same protected age class as Ms. Young, was demoted for reasons unrelated to those that led to Ms. Young's termination.<sup>1</sup> It was Ms. Young's burden to prove through actual evidence that Mr. Shuman's demotion was actually based on the racial, ethnic, and sexual misconduct of his

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<sup>1</sup> Moreover, Mr. Colletti was not even employed by the defendant, Bellofram Corporation ("Bellofram") when Mr. Shuman was demoted.

subordinates. Despite having an ample opportunity to make this record (neither party has appealed any evidentiary rulings of Judge Recht), she simply failed to do this. Accordingly, judgment should have been entered for defendants.

Second, there is no evidence that Joe Grilli (“Mr. Grilli”) – who Ms. Young desperately attempts to offer up to this Court as a fallback comparison employee – was either confronted with misconduct similar to that permitted (indeed, witnessed first-hand) by Ms. Young or that he ignored problems like Ms. Young did. Judge Recht plainly understood that Mr. Grilli was not a suitable comparison employee; dismissed him as a co-defendant at the close of plaintiff’s case; and failed to name him a single time in his entire Order. Certainly, Ms. Young could have cross-assigned error in her brief alleging that Judge Recht erred when he failed to consider Mr. Grilli as a comparison employee, but she did not do so and, consequently, all of her references to Mr. Grilli are in vain.

Third, as Judge Recht realized when he mentioned J.D. Harris (“Mr. Harris”) a total of one time in his Order, Mr. Harris was not a similarly situated employee. Mr. Harris was apparently a member of the protected age class<sup>2</sup> and Ms. Young failed to carry her burden of proving that he was aware of misconduct similar to that permitted by Ms. Young. Again, Ms. Young could have cross-assigned error in her brief alleging that Judge Recht erred when he failed to consider Mr. Harris as a comparison employee, but she did not do so and, consequently, all of her references to Mr. Harris are likewise in vain.

Finally, there was no evidence that Mr. Colletti’s actions were motivated by Ms. Young’s age or gender. Plaintiff testified that she did not think Mr. Colletti liked her because he never spoke to her, yet the evidence was clear that Mr. Colletti dealt with older women on a daily

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<sup>2</sup> The evidence established that he was “middle-aged.”

basis, hired them into management positions, and that his decision to fire Ms. Young was based on the advice of Sharon Coleman (“Ms. Coleman”),<sup>3</sup> Diane Kana (“Ms. Kana”),<sup>4</sup> and Mary Ellis (“Ms. Ellis”),<sup>5</sup> all women over the age of 40.

Despite the overwhelming evidence in support of the defendants’ position, Judge Recht improperly applied the relevant legal standards; failed to properly recognize how burden shifting works in a discrimination case; ignored the fact that Mr. Colletti was not employed at the time of Mr. Shuman’s demotion; and erroneously concluded that Mr. Shuman was a proper comparison employee who was treated more favorably than Ms. Young. Judge Recht, after admonishing the offending employees and concluding that Ms. Young deserved to be punished for permitting this misconduct, decided that he was better suited to play the role of human resources director than the four managers over 40 and ruled that Ms. Young should have merely been demoted.

Even assuming *arguendo* Mr. Shuman’s conduct was similar to Ms. Young’s, Judge Recht’s decision effectively requires employers to repeat the bad decisions of prior managers. A company should not be bound by the decisions of prior management. Nor, along the same lines, should a company be forced to retain a supervisor when doing so would subject it to legal liability from the very individuals who the supervisor failed to protect. This Court should recognize that an employer establishes a legitimate non-discriminatory reason when it shows that different supervisors were involved in the decisions to punish different subordinates. If a plaintiff then cannot demonstrate that this was a pretext for discrimination, the employer would prevail. In this case, Mr. Colletti was not involved in the decision to demote Mr. Shuman. Judge

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<sup>3</sup> Bellofram’s 50 year old female human resources director.

<sup>4</sup> Ms. Kana, who was over 40, was the human resources director for Desco, a company that assists Bellofram in a variety of areas, including human resources and finance.

<sup>5</sup> Ms. Ellis, the independent human resources expert who investigated the allegations that misconduct was occurring on Ms. Young’s shift, was also over 40.

Recht failed to consider this fact and, had he done so, should have entered judgment for the defendants because of Ms. Young's failure to rebut the non-discriminatory reasons as pretext.<sup>6</sup>

It speaks volumes that the Chamber of Commerce ("Chamber"), the West Virginia Manufacturers' Association ("Manufacturers"), and the International Brother of Teamsters Union ("Union") have all filed briefs in support of the defendants. The facts and legal positions put forth in the various briefs in support of the defendants make it clear that the wrong result was reached at trial. No amount of twisting the evidence and applying incorrect and unworkable legal standards can overcome a clearly erroneous decision.

## II. STATEMENT OF FACTS

Plaintiff's "Clarification of Facts" selectively quotes, misquotes, and omits testimony in an effort to create, not restate the evidence. Defendants take issue with the following assertions:

- A. THE ACTUAL EVIDENCE CONTRADICTS PLAINTIFF'S ASSERTION THAT SHE "WAS TERMINATED DESPITE THE FACT THAT OTHER YOUNGER MALE SUPERVISORS WERE LIKEWISE AWARE OF INAPPROPRIATE CONDUCT AND FAILED TO TAKE ANY ACTION JUST AS SHE WAS ALLEGED TO HAVE DONE."<sup>7</sup>**

In support of the position that younger male supervisors were aware of similar conduct and failed to act, Ms. Young first cites Heather Wells' testimony.<sup>8</sup> However, the testimony does not support the contention that Mr. Grilli "failed to take any action":

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<sup>6</sup> Plaintiff argues that companies will merely have different members of management make decisions regarding different employees in order to avoid liability. As made perfectly clear in Bellofram's brief, Mr. Colletti did not even work at Bellofram at the time that Mr. Shuman was demoted. Moreover, Bellofram is not asking this Court to remove a trial judge's ability to consider that a legitimate non-discriminatory reason is in fact pretextual when there is evidence that a company intentionally has different management level employees make decisions in order to circumvent liability. No such evidence exists in this case.

<sup>7</sup> Plaintiff's Brief at p. 4.

<sup>8</sup> The incident discussed involved a missing wallet. Bill Friley ("Mr. Friley") implied that, because her children were biracial, Ms. Wells had taken the wallet. Wells Depo at 16-17.

Q: Okay. And if you, as you said, flipped out, would you have gone to your supervisor?

A: Oh, yeah.

Q: If you needed to go beyond your supervisor, would you have done that?

A: Yes. But Joe Grilli basically – if you went to him, he would – he’s always tried to help you –

Q: Uh-huh

A: -- and work everything out.<sup>9</sup>

\* \* \*

A: And I went to Joe Grilli and I had a chat with him. We all got pulled upstairs that day because there was – it was just like a big fight going on in molding. Everybody was blaming everybody. . .

Q: Okay. You went to Mr. Grilli about that?

A: Yes, I did.

Q: Okay. And what did Mr. Grilli do?

A: He pulled us all upstairs and yelled at all of us. It was like the first time I ever heard him yell.

Q: Okay. Did anybody get suspended?

A: No. Q: Did anybody get days off?

A: No. Everybody just got told there was no more comments to be made. There was – everything was done and over with. And everything was to be stopped now or there were – if it came down to it, then somebody would get in trouble if everything wasn’t stopped.<sup>10</sup>

Ms. Young next cites Mr. Shuman’s testimony in hopes of supporting her position that Mr. Shuman, like Mr. Grilli, was aware of misconduct and failed to act:

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<sup>9</sup> Wells Depo. at 16.

<sup>10</sup> *Id.* at 16-18 (emphasis supplied).

Q: What kind of complaints did you have?

A: Adam was with – something about Mandy Chipps. He was always picking on her, so she said. Bill Friley? I don't know, just comments here and there about other people.

Q: What did you do about the complaints you received about these individuals?

A: I had a talk with them.<sup>11</sup>

While the preceding testimony fails to show either the type of misconduct or that Mr. Shuman ignored it, additional testimony from Mr. Shuman – conveniently omitted by Ms. Young – helps clarify what Mr. Shuman knew:

Q: And you were trained on your obligations as a supervisor on how to deal with issues related to sexual harassment and racial discrimination?

A: We had a few, yes.

Q: What's your understanding, if you saw an incident like that going on on your shift, what were your responsibilities?

A: Well, I'd have to go have a talk with them.

Q: Would you ignore it?

A: No. . . .<sup>12</sup>

\* \* \*

Q: Now, did you – did any of these issues come up while you were a supervisor?

A: One time it did yes.

Q: What was that?

A: Girl come and told me see if I could have a talk with somebody; he kept touching my arm. And I went and had a talk with him, which I knew him pretty well, and it didn't happen any more.<sup>13</sup>

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<sup>11</sup> Trial Tr. at 51. (emphasis supplied).

<sup>12</sup> *Id.* at 60.

<sup>13</sup> *Id.* at 61 (emphasis supplied).

\* \* \*

Q: So you never witnessed Adam Farmer engage in any sexual harassment or racial discrimination while you were supervisor?

A: No.<sup>14</sup>

\* \* \*

Q: And did you ever ignore any conduct by Mr. Friley that you believe constituted racial discrimination?

A: Not that I know of.<sup>15</sup>

Next, Ms. Young cites Ms. Ellis' testimony regarding Mr. Harris in an effort to support her claim that Mr. Harris was aware of misconduct, ignored it, and was not punished:

Q: What's J.D. Harris' position?

A: I believe, as I recall, he's a supervisor in another area.

Q: So he's a supervisor on the second shift?

A: I believe so.

Q: Now, did he express to you that he had heard some things and seen some things?

A: Yes, he did.

Q: Did he indicate to you that he had reported those to management?

A: No, he did not indicate that to me.

Q: Was J.D. Harris suspended?

A: No, he was not.

Q: Was J.D. Harris terminated, to your knowledge?

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<sup>14</sup> *Id.* at 63-64.

<sup>15</sup> *Id.* at 64.

A: I'm not aware that he was. . .

Q: And Mr. Harris is a male, correct?

A: Yes, he is.

Q: How old is Mr. Harris; do you know?

A: I don't know.

Q: If you had to make an estimate, could you give us an estimate?

A: I remember him being middle-aged; I just don't remember.<sup>16</sup>

Mr. Harris saw “some things”? The natural follow up question would have been: “what things?” Instead, counsel moved on, apparently satisfied that “some things” satisfied Ms. Young’s burden to prove that the “things” witnessed by Mr. Harris were sufficiently similar to the rampant misconduct that took place under Ms. Young’s watch. Also, the testimony that Mr. Harris was “middle-aged” makes it is clear that he was in the same protected age group as the plaintiff.

Ms. Young then cites to her own testimony:

A: Well, actually at the time this happened they was having J.D. Harris oversee preform. At the time we got suspended, actually J.D. was taking care of preform then. Then we were both supervising on our afternoon turn; they could come to either one of us, me or J.D.<sup>17</sup>

But her later testimony makes it clear that she cannot pinpoint when Mr. Harris was in this supervisor position:

Q: Is it your testimony that you were not the supervisor of the preform area, Ms. Young?

A: Yes, I was a supervisor in the preform area, but right – for a while there J.D. – Joe asked J.D. to supervise the department for a little while.

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<sup>16</sup> *Id.* at 448-49 (emphasis supplied).

<sup>17</sup> *Id.* at 287-88.

Q: You can't place when that little while was?

A: I don't know the exact dates, no.<sup>18</sup>

Of course, this is critical evidence, on which Ms. Young bore the burden of proof, because if Mr. Harris was not the supervisor of the employees in question, he had no authority to stop the conduct. By her own admission, Ms. Young did. Thus, Mr. Harris cannot be similarly situated.

Ms. Young cites Mr. Colletti's testimony to show that Mr. Harris was aware of misconduct and was not punished. However, the testimony does not support that assertion:

Q: He's aware of allegations made about Adam Farmer; is that correct?

A: I cannot speak for J.D. Harris, so I don't know what J.D. Harris may or may not know.

Q: There's no disciplinary action taken against J.D. Harris, though?

A: For what reason, sir?

Q: For any type of racial or sexual harassment?

A: None that I'm aware of.<sup>19</sup>

Based on the testimony from Ms. Ellis, Ms. Young, and Mr. Colletti, all we know about Mr. Harris is that: (1) he was a "middle-aged;" (2) he knew "some things;" (3) at some point he was a supervisor on the second shift; and (4) he was not punished for racial or sexual harassment that – as far as we know – had nothing to do with these "some things."

More importantly, Judge Recht never used Mr. Harris as the comparison employee, but only used Mr. Shuman because at least Mr. Shuman previously held Ms. Young's position and supervised the same employees whom Ms. Young permitted to run wild. Ms. Young's failure to

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<sup>18</sup> *Id.* at 313 (emphasis supplied).

<sup>19</sup> *Id.* at 765 (emphasis supplied).

assign cross-error to Judge Recht's Order on this ground precludes her from advancing any argument that rests upon Mr. Harris or Mr. Grilli.

Next, Ms. Young cites to Ms. Coleman's testimony in support of her position that Mandy Chipps ("Ms. Chipps") went to Mr. Grilli with a problem,<sup>20</sup> that Mr. Grilli failed to address it, and that he was not punished. However, simply taking the testimony cited to by Ms. Young and reading an additional page makes clear that Mr. Grilli was responsive:

Q: So Mr. Grilli was aware?

A: Of?

Q: Mr. Farmer's conduct towards Mandy Chipps?

A: In that instance, yes.

Q: He knew that Adam Farmer was harassing Mandy Chipps?

Q: [from the Court] The question is: Was Grilli in any way disciplined because he failed to take action once he found out about the misconduct?

A: He took action. So that's why he was not disciplined.

Q: What action did he take?

A: He went to Adam Farmer and had a discussion with him regarding his behavior and verbalized to him that he could not continue that behavior or he would have further discipline.

Q: And that was fine and, if Linda Young did the same thing to Jackson, then that wasn't fine; is that what you're saying?<sup>21</sup>

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<sup>20</sup> Ms. Young's brief failed to inform the reader of the reason for Ms. Chipps' complaint. Ms. Chipps went to Mr. Grilli to complain about a dead mouse or rat being placed in her pocket. *Id.* at 686. While disturbing, there was no testimony that this incident involved unwelcome sexual advances, sexist language, or overt racism, all conduct that led to Ms. Young's termination.

<sup>21</sup> Part of this testimony is quoted on page 9 of Ms. Young's brief. However, Ms. Young conveniently omits the answer to Judge Recht's question.

A: Not at all. It continued, and Joe Grilli never got any more complaints from anybody. He didn't know it was continuing after he talked to Adam because no one went to him again.

Q: Okay.

A: That was the reason.<sup>22</sup>

Of course, this testimony is one of many reasons Judge Recht never used Mr. Grilli as a comparison employee, i.e., unlike Ms. Young, Mr. Grilli took decisive action to eradicate harassing conduct.

Plaintiff cites to testimony by Sandy Chambers (“Ms. Chambers), who convinced Ronald Jackson (“Mr. Jackson”) to take his complaints to Ms. Coleman, thus starting the entire investigation into Ms. Young’s conduct as second-shift supervisor. This testimony appears to be offered to show: (1) that Mr. Grilli did not take Mr. Jackson seriously;<sup>23</sup> (2) that Mr. Grilli flirted with females; and (3) that Mr. Grilli did not take all complaints seriously.<sup>24</sup>

But, on cross-examination it became clear that Ms. Chambers believed that Mr. Grilli dealt with harassment claims seriously, that he never ignored a problem, and that the flirting was neither unwelcome nor initiated by Mr. Grilli:

Q: How about Mr. Grilli’s response to sexual harassment claims?

A: No, I thought he took those pretty seriously.<sup>25</sup>

\* \* \*

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<sup>22</sup> Trial Tr. at 686-87.

<sup>23</sup> *Id.* at 76. (“Q: But he wasn’t taking it seriously? A: No, I didn’t think he was taking it seriously at the time.”).

<sup>24</sup> *Id.* at 79. (“Q: Did you also report to Ms. Ellis that there was an employee who was flirting with Mr. Grilli? A: There was – yes, I did at that time. . .”).

<sup>25</sup> *Id.* at 81 (emphasis supplied).

Q: Every time you've gone to Mr. Grilli about a problem, he's taken care of it for you, correct?

A: Yes.

Q: He's never shrugged his shoulders at you?

A: No.

Q: He's never gone back into his office and ignored any problems that you reported to him?

A: No.<sup>26</sup>

\* \* \*

Q: [i]n your deposition testimony and likewise in your testimony today, you can't identify any particular individual that Mr. Grilli allegedly took not seriously, right?

A: Firsthand, no.<sup>27</sup>

\* \* \*

Q: Now, let's talk about these exchanges you told Mr. Pearl about. I believe you indicated there were some exchanges between Mr. Grilli and Ms. Johnson, I believe it was, or Maria Swiger?

A: Maria Swiger.

Q: Okay, Maria Swiger. These exchanges were initiated by Ms. Swiger, not Mr. Grilli, correct?

A: Correct.

Q: And Ms. Swiger, in your observation, never appeared uncomfortable with the remarks that she either made to or received from Mr. Grilli, correct?

A: Correct.

Q: And you didn't report these comments to anyone until you told Ms. Ellis about them, correct?

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<sup>26</sup> *Id.* at 92-93.

<sup>27</sup> *Id.* at 96.

A: Correct. . .<sup>28</sup>

Plaintiff also cites testimony from Ms. Ellis.<sup>29</sup> However, nothing in the three pages cited to involves “younger male supervisors” who were aware of similar misconduct.

**B. THE ACTUAL EVIDENCE CONTRADICTS PLAINTIFF’S ASSERTION THAT SHE “WAS ALSO TERMINATED DESPITE THAT FACT THAT MR. SHUMAN HAD ONLY BEEN DEMOTED FOR THE SAME CONDUCT.”<sup>30</sup>**

Plaintiff first cites to Mr. Shuman’s testimony.<sup>31</sup> However, this testimony only makes one thing clear: that Mr. Shuman was demoted. This testimony does not explain why, and it certainly does not establish that the demotion was the result of the “same conduct” that led to Ms. Young being terminated.

Second, Ms. Young cites to Mr. Grilli’s trial testimony. By taking the testimony entirely out of context, Ms. Young creates the notion that she was not treated fairly:

Q: You bumped Donnie back because there was inappropriate behavior of employees that Donnie dealt with, right?

A: I gave an example. I do not remember; I gave an example.

Q: You can give an example; you can explain your answer, but first answer my question.

A: Yes.

Q: One of the examples is that he didn’t discipline employees, right?

A: Yes.

Q: And because of that, he got demoted, right?

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<sup>28</sup> *Id.* at 93-94.

<sup>29</sup> Plaintiff’s Brief at 4 cites to Trial Tr. pp. 452-54, which is testimony from Ms. Ellis.

<sup>30</sup> *Id.* (emphasis supplied).

<sup>31</sup> *Id.* (citing Trial Tr. at 52-54).

A: One of the reasons, yes.

Q: He was demoted for inadequate work performance, and he did not have good control of shop floor personnel; is that right?

A: Yes.

Q: He wanted to be friends with everyone, right?

A: Yes.

Q: He wouldn't try to discipline people if they were doing anything inappropriate, correct?

A: Yes.

Q: Because of all that, his supervisory position was taken away from him, and he went back to the unit, right?

A: When he got demoted, yes.<sup>32</sup>

However, when allowed to "give an example," it becomes clear what Mr. Grilli meant:

Q: Let's talk about Donnie Shuman. Mr. Frankovitch asked you a number of questions regarding Mr. Shuman's inadequacies as a supervisor. And I think a couple – one of the questions he asked: You said there was inappropriate behavior on the shift that Donnie permitted, and I think the other question was: Donnie was demoted for not disciplining people on the shift; you recall those questions?

A: Yes.

Q: And I believe that you were trying to offer an example of the conduct that Mr. Shuman permitted?

A: Yes.

Q: Go ahead and share; what is an example?

A: A lot of times I work well past – the first break in the second shift is 5:30 in the afternoon, and a lot of times I'm there well past 5:30. And there was many instances where I saw some employees coming – their break time is 5:30 to 5:40, and there was many times when Donnie was on the shift that I noticed the

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<sup>32</sup> Trial tr. at 596-597.

employees coming back from break. Instead of taking a 10-minute break, they were taking a 15 minute break or more. . .

Q: To your knowledge did Donnie Shuman ever permit sexual harassment or racial discrimination to go on on his shift?

A: Not that I was ever made aware of.

Q: So when Mr. Frankovitch asked you about inappropriate behavior that Mr. Shuman permitted, we're not taking about sexual harassment or racial discrimination?

A: No, I was only talking about the example that I gave, 'cause that's one I knew.<sup>33</sup>

When allowed to explain, Mr. Grilli made clear that Mr. Shuman's failure to control his shift involved the failure to ensure that his employees were actually working when they were supposed to be working. This is hardly the "same conduct" for which Ms. Young was punished.

**C. THE ACTUAL EVIDENCE CONTRADICTS PLAINTIFF'S ASSERTION THAT THE "ONLY EMPLOYEES WHO TESTIFIED THAT THEY COMPLAINED TO LYNDY YOUNG" WERE MS. KIRKBRIDE AND MR. JACKSON."**<sup>34</sup>

Plaintiff mischaracterizes the evidence supporting Ms. Young's termination by claiming that only two employees complained to her. First, she states that Ms. Kirkbride complained "about Alan Lockwood staring at her."<sup>35</sup> Ms. Young cites Ms. Kirkbride's<sup>36</sup> testimony:

Q: But as far as what you actually know that Lynda Young knew about, from all these times you just mentioned, one time when you complained to her about Alan Lockwood staring at you, right?

A: (nodding head).<sup>37</sup>

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<sup>33</sup> *Id.* at 607-608 (emphasis supplied).

<sup>34</sup> Plaintiff's Brief at 4.

<sup>35</sup> *Id.*

<sup>36</sup> Angela Kirkbride was formerly known as Angela Coleman.

<sup>37</sup> Trial tr. at 542-43.

However, Ms. Young conveniently omits substantial testimony where Ms. Kirkbride made clear that there was more than a single incident of misconduct and that Ms. Young – her supervisor – directly witnessed it and did nothing:

Q: Who was you supervisor when these problems with Mr. Friley, Mr. Farmer, and Mr. Lockwood started?

A: Lynda Young.

Q: Did you go to Ms. Young about the staring?

A: Yes.

Q: What did you ask her to do?

A: I wanted to be moved.

Q: What did she say?

A: That she couldn't move me.

Q: Did she say why not?

A: It would mean she would have to move other people.<sup>38</sup>

\* \* \*

Q: Did you complain to Ms. Young about the arm – Mr. Lockwood's arm around you?

A: Yes.<sup>39</sup>

\* \* \*

Q: [w]hat did you tell Ms. Young about the arm in May, 2005?

A: Just that it made me uncomfortable, really didn't like him doing that.

Q: What was her response?

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<sup>38</sup> *Id.* at 535 (emphasis supplied).

<sup>39</sup> *Id.* (emphasis supplied). This is hardly the same as staring.

A: That's just the way he is. He doesn't mean anything by it.

Q: Did she tell you to ignore it?

A: Pretty much so.

Q: Did you tell Ms. Ellis about this exchange?

A: Yes.<sup>40</sup>

\* \* \*

Q: Did you ever hear Mr. Farmer make any comments about men?

A: Yes.

Q: What kind of comments did you hear him make about other men?

A: We had this young guy that just started. His name was Craig Efrati. Adam and some of the other guys, they used to say they thought he was gay, and he used to make, like, homosexual comments to him, pretended he was also gay, and he would, like, ask him if he wanted to go parking at the drive-in, stuff like that.

Q: Was Ms. Young present for that?

A: Yes.

Q: Did you see her respond in any way?

A: No.

Q: Did Ms. Young's response, not just on the Mr. Efrati events, but on these other events that you told us about, did her response suggest to you that it was – what did her response suggest to you about complaining?

A: Just that nothing would happen.

Q: Did you tell Ms. Ellis that Lynda Young was present for many of the comments that you've described today?

A: Yes.<sup>41</sup>

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<sup>40</sup> *Id.* at 536 (emphasis supplied). So, Ms. Kirkbride testified Ms. Young was her supervisor, knew of misconduct, told Ms. Kirkbride to ignore it, and Ms. Kirkbride gave this information to Ms. Ellis. Ms. Young's position that Ms. Ellis did not provide Bellofram with information of wrongdoing by Ms. Young is hardly supportable in light of this testimony alone.

\* \* \*

Q: Ms. Kirkbride, in addition to your complaint to Ms. Young, was Ms. Young present at some of these events you've testified to?

A: Yes.

Q: And based on her presence, do you believe that she knew that those things happened?

A: Yes.<sup>42</sup>

Despite plaintiff's assertions to the contrary, Ms. Kirkbride's testimony is not that she simply went to Ms. Young about a "staring" incident. She testified that there were multiple times she complained to Ms. Young, that Ms. Young told her to simply ignore the conduct, that Ms. Young witnessed other misconduct and failed to properly address it, and that Ms. Ellis was provided with this information.

Second, the plaintiff, citing to Mr. Jackson's testimony, states that he "testified that Ms. Young may have heard him be threatened by Mr. Friley and Mr. Farmer."<sup>43</sup> Mr. Jackson's testimony reveals more than the plaintiff would have this Court believe:

Q: What did they say?

A: At first, they would say in a third-party form, looking at me when they said it, knowing that I knew they were calling me the fucking rat. They would say: Back in the day, the union employees, when they got a fucking rat in the union, they would take them out and beat the hell of 'em, take them out in the woods, beat the hell out of 'em. Another instance, they would say: Back in the day, and they would hold their hand up simulating a gun, and they take the fucking rat and be – you know.

Q: They'd make a gun gesture with their hands?

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<sup>41</sup> *Id.* at 537-38 (emphasis supplied).

<sup>42</sup> *Id.* at 544.

<sup>43</sup> Plaintiff's Brief at 4 (emphasis supplied).

A: Right, using gestures with their hand, look at me smiling, thinking it was funny.

Q: Who made the gun gesture with his hand?

A: Adam Farmer.

Q: What did you do when they were threatening you; did you tell anybody about it?

A: A couple times. The first incident I did speak with my lead because I didn't know who I could talk to.

Q: That was Sandy Chambers?

A: That was Sandy Chambers.

Q: What did she tell you to do?

A: Sandy told me I needed to take it to their boss, because I was still in quality at the time, which was Linda Young.

Q: And did you do that?

A: I spoke to her about it.

Q: And what did you tell her?

A: Well, I went over what was said, and she said she would take care of it the first time.

Q: Did speaking to Lynda Young, did that take care of it?

A: No, sir, it kept on.

Q: Did it get better?

A: No, sir.

Q: Did it get worse?

A: Yes, sir.<sup>44</sup>

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<sup>44</sup> Trial tr. at 479-480 (emphasis supplied).

Ms. Young was aware that Mr. Jackson was being threatened, and yet the problem got worse. Moreover, Ms. Young claims that “both Ms. Young and Mr. Jackson indicated that Ms. Young talked to Mr. Friley about his conduct toward Mr. Jackson.”<sup>45</sup> However, there is no indication in Mr. Jackson’s testimony that he was aware that Ms. Young ever spoke to Mr. Friley.<sup>46</sup> What is clear from Mr. Jackson’s testimony – that is omitted by Ms. Young - is that Ms. Young knew of misconduct and told employees to just ignore it:

A: But with other women, with the women that was there, we had a couple new start. One lady’s name was Chrissy; the other one was Terry. They were there about three or four days. Adam Farmer – we were on a heat break. Adam Farmer looked at Terry and Chrissy, said: Hey, why don’t you come over sit on my lap and we’ll talk about the first thing pops us. I looked at Mr. Farmer and said: That’s inappropriate; you shouldn’t talk to those ladies like that.

Q: Where was Lynda Young when this incident happened?

A: She was on the steps where she always took her break at during those breaks.<sup>47</sup>

\* \* \*

Q: So was Lynda Young present for this incident?

A: She was out there, yes.

Q: Do you know whether or not she witnessed these comments made by Mr. Farmer to these two new women?

A: I don’t see how she couldn’t because she was six feet away, between five and six feet away from them.

Q: Did you say anything to Lynda Young?

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<sup>45</sup> Plaintiff’s Brief at 4.

<sup>46</sup> Plaintiff, on page 4 of her brief, cites to Trial Tr. at 480 in claiming that Mr. Jackson knew that Ms. Young spoke with Mr. Friley. That page does not indicate that Mr. Jackson believed that Ms. Young spoke with Mr. Friley and is another inaccurate citation from the plaintiff.

<sup>47</sup> Trial Tr. at pp. 481-482.

A: As I went by, I asked her, I said: Did you hear what they said?

Q: What did she tell you?

A: She said: I don't pay attention to what they say, they say so much shit. They say shit all the time.

Q: Other than that break-time incident, can you recall other times while you were on second shift in molding that you went to Lynda Young with a complaint about Mr. Friley and Mr. Farmer?

A: Yes, there was other incidents where they – there was an incident when they done the gun gesture. Probably about 15 feet away from her at the time, but she was on the steps. . . I got up. I'm looking – I looked at Ms. Young in disbelief that that was just said. So I got up. As I went past her, I said: Did you just hear what they said? Same response: No, I don't listen to them. They say shit about me all the time, such as they call me an old hag, an old whore all the time. I don't pay any attention to what they say.<sup>48</sup>

\* \* \*

Q: Did you go back to Lynda Young after the harassment picked up again?

A: Yes, sir.<sup>49</sup>

\* \* \*

Q: What did you tell Ms. Young?

A: I told her that they're still going; they're bothering other people, not just myself, but they're bothering other people, and I'm tired of hearing it.

Q: What was her response to you?

A: She said: Ron just ignore them. I told you, they call me stuff all the time. I just let it go through one ear and out the other. Just don't let it bother you. If you ignore them; they'll leave you alone.<sup>50</sup>

In addition to misrepresenting Mr. Jackson and Ms. Kirkbride's testimony, Ms. Young omits witness testimony – including her own – proving that she knew of misconduct and chose to

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<sup>48</sup> *Id.* at 482-484 (emphasis supplied).

<sup>49</sup> *Id.* at 487.

<sup>50</sup> *Id.* at 488 (emphasis supplied).

ignore it.<sup>51</sup> Ms. Young admitted to Sharon Coleman that her management style was “see no evil, hear no evil.” This interview was, in part, the impetus for Bellofram’s retention of Ms. Ellis:

Q: What do you recall Lynda Young telling you?

A: I asked Lynda if she knew of anything that was going on the second shift that was inappropriate. She said the Ronnie had come to her and complained about Bill Friley at one point in time calling him a rat, and she said that she would talk to him. And she says that – you know, that she hears a lot of things and stuff, but just kind of ignores it and tells the people to ignore it.<sup>52</sup>

Sandy Chambers also testified that Ms. Young was aware of misconduct:

Q: Did you tell Ms. Ellis that you knew that at one time Lynda Young was out there when it was said that they were going to be beat the F’ing out of the rat?

A: I probably did.

Q: And, in fact, that’s true; you were there present when Ms. Young was present and that comment was made?

A: Yes.<sup>53</sup>

Mandy Chipps also testified to Ms. Young’s rather unique style of management:

Q: Did Mr. – When Mr. Farmer and Mr. Friley made these inappropriate comments, was Lynda Young around?

A: Sometimes.

Q: And was this during the time that she was a supervisor?

A: Yes.

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<sup>51</sup> This testimony contradicts plaintiff’s claim that “the only evidence pointed to by Bellofram in support of Ms. Young’s knowledge of harassing conduct is her admission that Mr. Friley was known by everyone at the Bellofram facility to use racial slurs in his speech. (Tran. 272-73).”

<sup>52</sup> *Id.* at 670 (emphasis supplied). Did Ms. Young not realize the implications of making such a statement to Bellofram’s human resources director? Moreover, in light of this admission by a supervisory agent of Bellofram, to the Human Resources Manager, is it any wonder that Ms. Young was suspended pending the Ellis investigation?

<sup>53</sup> *Id.* at 90.

Q: How frequently would you estimate that Mr. Friley or Mr. Farmer said something inappropriate, like one of these racial or sexual terms, and Ms. Young heard it?

A: Probably a couple times. . .

Q: What was Ms. Young's reaction that you could observe?

A: She just kind of shook her head, and went back inside.

Q: Would she ever laugh?

A: Sometimes.

Q: Did you ever heard – did you ever once hear her tell – make any statements to Mr. Friley or Mr. Farmer about the comments?

A: No.

Q: Did you ever say anything to Ms. Young about these comments?

A: No.

Q: Why not?

A: Just because I didn't think it would do any good.

Q: Did you not think it would do any good based on her reaction?

A: Yes.<sup>54</sup>

Heather Wells' was also aware of Ms. Young's method of management:

A: [s]ometimes she would laugh because it was just stupid stuff and say that they were just joking around. Or you'd go to her – like, a lot of times when I went to her about what Bill Friley said – because, I mean, I told her – I mean, I would go in there yelling and screaming about stuff that he would say. And she would say, "Oh, just ignore him."<sup>55</sup>

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<sup>54</sup> *Id.* at 558-559 (emphasis supplied).

<sup>55</sup> Wells Depo. at 32-33 (emphasis supplied).

In fact, Young admitted at trial that she witnessed this misconduct on her shift, but simply chalked it up to “that’s the way these guys are.” On cross-examination, for example, plaintiff admitted that she heard Mr. Friley use this racist language while she was his supervisor:

Q: You’ve heard him use those terms when you were the supervisor in the molding department, right?

A: Not – in general conversation, yeah. He never actually called people it to their face. If he had, I’d have called him on it.

Q: So it was okay in your view that Mr. Friley could use terms like “nigger, “sand nigger,” and maybe “spic” as long as he didn’t say it to the face of the person; that would be the differential for you to take disciplinary action?

A: No, that’s not what I mean at all.

Q: Ah. . .

A: I’m not saying I think it’s right. I’m saying that’s the way Bill talked, and it wasn’t directed at anyone specifically.

Q: And you heard him talk like that when you were a supervisor, just to make sure we’re clear on that, correct?

A: When he was on breaks and stuff, but Bill watched what he said around me. They didn’t talk bad in front of me.

Q: I heard that testimony from Mr. Friley as well, but my question is, Ms. Young: He used these terms in front of you when you were his supervisor, right?

A: Now and then I heard him say those things like that, yes.<sup>56</sup>

Moreover, the plaintiff admitted that she was aware that this language was prohibited and that failure to correct it justified a supervisor’s termination:

Q: You understood – I think you’ve just acknowledged, but let me make clear also that all of these terms, “nigger, “sand nigger, “spic,” they’re all, inappropriate, right?

A: Yes, to me they’re inappropriate.

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<sup>56</sup> Trial Tr. at 275-276 (emphasis supplied).

Q: They're all slurs?

A: Yes, they're inappropriate.

Q: They're all slurs against someone because of their race, right, or national origin, right?

A: Right.<sup>57</sup>

\* \* \*

Q: Now, I think this is clear from your direct, but let's make sure. You knew the company prohibited sexual and other forms of harassment, right?

A: Yes.

Q: And that the company wouldn't tolerate such conduct if it occurred?

A: Yes.

Q: And that the policy against sexual harassment was one of the policies you were required to enforce as a supervisor?

A: Yes.

Q: And you were fully aware of what types of conduct constituted sexual and racial harassment, right?

A: Yes.<sup>58</sup>

\* \* \*

Q: You understood as a result of your training that dirty jokes, racy stories, foul language, they could be sexual harassment if they offend anyone at work, right?

A: Yes, if someone complains about them.

Q: You further understood that, just because no one complained about the inappropriate language, it did not mean the conduct was not offensive, right?

A: It's offensive to me. I don't like bad language and dirty jokes.

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<sup>57</sup> *Id.* at 276.

<sup>58</sup> *Id.* at 279-280.

Q: Okay. Let me back up. I think I may have confused you, Ms. Young. You understood from your training that harassment and discrimination could still be offensive, even if no one complained about it, correct?

A: Yes.

Q: You also knew that other forms of name calling were not appropriate as well, right?

A: Yes, I know.

Q: And you were also fully aware that, if one of the employees you supervised engaged in this type of behavior, that would violate the plant rules of conduct, right? Ms. Young, would you agree with me that if a company determined that a supervisor was aware of comments and conduct of a sexual, racial, or national origin nature but didn't stop the comments, it would be appropriate to terminate that employee?

A: If the supervisor was aware of it or made aware of it, yes.<sup>59</sup>

Finally, having admitted that (i) she heard this language; (ii) this language was prohibited; and (iii) as a supervisor, she had a duty to correct this misconduct or face termination, plaintiff admitted that she did not correct the racist and sexist language on the second shift.<sup>60</sup>

**D. THE ACTUAL EVIDENCE CONTRADICTS PLAINTIFF'S ASSERTION THAT "HARASSMENT OCCURRED DURING DONALD SHUMAN'S TENURE AS SUPERVISOR."**<sup>61</sup>

Ms. Young's "Clarification of Facts" repeatedly distorts testimony in an effort to show that misconduct occurred under Mr. Shuman's watch and that he knew about it. First, Ms. Young claims that Mr. Shuman was demoted for failing to control his shift and cites to Mr.

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<sup>59</sup> *Id.* at 283-284 (emphasis supplied).

<sup>60</sup> *Id.* at pp. 276-77. ("Q. You didn't write up Mr. Friley for his language, did you? A. No, I didn't write anybody else when they used foul language either; some of my supervisors did.")(emphasis supplied).

<sup>61</sup> Plaintiff's Brief at 5.

Grilli's testimony.<sup>62</sup> However, as this reply has pointed out, Mr. Grilli demoted Mr. Shuman for more generalized supervision issues, such allowing employees to exceed their break time.<sup>63</sup>

Second, the plaintiff cites to Ms. Wells' testimony as proof that "The most egregious racial harassment allegedly committed by anyone in this case occurred during Mr. Shuman's tenure as supervisor."<sup>64</sup> The problem is that Ms. Wells never testified that the conduct occurred under Mr. Shuman's watch:

Q: What I'm asking is did the types of problems that you're talking about with Mr. Friley, Mr. Farmer, and Mr. Lockwood, were those kinds of things going on while Mr. Shuman was the supervisor?

A: I'm trying to think back. That was a long time ago.

Q: I understand. And if at any time you don't know or you don't remember, that is an okay answer.

A: I really – I don't really remember.<sup>65</sup>

Third, Ms. Young selectively incorporates testimony in an attempt to show that Mr. Shuman was supervisor when Ms. Chipps was harassed and that he knew about the harassment.<sup>66</sup> However, omitted testimony shows not only that Mr. Shuman was not the supervisor at the time, but that he was unaware of the misconduct that occurred under Ms. Young's supervision:

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<sup>62</sup> Plaintiff's Brief at 5 (citing Trial Tr. at 596-97).

<sup>63</sup> Trial Tr. at 607-608. Interestingly, Ms. Young's own testimony was that Mr. Shuman "didn't have a clue" about this type of misconduct. *Id.* at 289 (emphasis supplied).

<sup>64</sup> Plaintiff's Brief at 5 (citing Wells Depo at 16-18).

<sup>65</sup> Wells Depo at 24. Plaintiff states that Bellofram "asked the Circuit Court to believe that this event had nothing to do with Mr. Shuman's demotion. It now asks this Court to make the same finding." Plaintiff's Brief at 5. Bellofram, though, is not asking this Court to "believe" anything. Rather, Bellofram is asking that this Court recognize that it was Ms. Young's burden to prove through actual evidence that Mr. Shuman's demotion was actually based on the racist and sexist misconduct of his subordinates. Despite having an ample opportunity to make this record (neither party has appealed any evidentiary rulings of Judge Recht), she simply failed to do this. Accordingly, judgment should have been entered for defendants.

<sup>66</sup> *Id.* at 6 (citing Trial Tr. at 51).

Q: So you never witnessed Adam Farmer engage in any sexual harassment or racial discrimination while you were supervisor?

A: No.<sup>67</sup>

\* \* \*

Q: And did you ever ignore any conduct by Mr. Friley that you believe constituted racial discrimination?

A: Not that I know of.<sup>68</sup>

Just as importantly, Ms. Chipps testified that the harassment she suffered at the hands of Friley, Farmer, and Lockwood occurred when Lynda Young – not Mr. Shuman – was supervisor:

Q: You started working there in June 2005 (sic); Lynda Young wasn't your supervisor in June of 2000, excuse me. Lynda Young was not your supervisor in June of 2000?

A: No.

Q: Was this conduct going on back then?

A: No.

Q: It was not?

A: No, I was not even in the same department when I started.

Q: When did you start working in that department?

A: I think it was April of 2003.

Q: April of 2003, was Ms. Young your supervisor then?

A: I don't think so.

Q: This conduct went on then, correct?

A: No.

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<sup>67</sup> Trial Tr. at 63-64.

<sup>68</sup> *Id.* at 64.

Q: It did not?

A: No.

Q: When did this all start then?

A: It started – I can't really recall all the dates, but it started probably – I had quit or pointed out or whatever in July 2004, and it started probably a few months before that.

Q: Did you leave in June of 2004 or June of 2005?

A: Oh, I'm sorry, 2005.<sup>69</sup>

Ms. Young was supervisor between June 28, 2004<sup>70</sup> and October 2005.<sup>71</sup> So, she was the supervisor during the time that Ms. Chipps testified to being harassed. Ms. Chipps left her employment rather than continue to be subjected to Mr. Farmer's misconduct. She began taking medication as a result of her workplace interactions with Mr. Farmer. Bellofram respectfully submits that the conduct Ms. Chipps experienced was "the most egregious" harassment in this case, and her testimony conclusively establishes that it occurred entirely on Ms. Young's watch.

**E. THE ACTUAL EVIDENCE CONTRADICTS PLAINTIFF'S ASSERTION THAT "J.D. HARRIS WAS AWARE OF HARASSMENT AND TOOK NO ACTION."<sup>72</sup>**

First, Ms. Young alleges that Mr. Harris was "another younger" male supervisor.<sup>73</sup> Of course, the only evidence of Mr. Harris' age is that he appeared "middle-aged." While Mr. Harris may be younger than Ms. Young, neither the evidence nor the testimony cited to by Ms. Young supports this assertion. Second, Ms. Young claims that Mr. Harris was "likewise aware

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<sup>69</sup> Trial tr. at 565-566 (emphasis supplied). After some initial confusion as to the year, it becomes clear that the harassment of Ms. Chipps began several months prior to her departure in June 2005.

<sup>70</sup> *Id.* at 590.

<sup>71</sup> Defendant's Trial Exhibit 7.

<sup>72</sup> Plaintiff's Brief at 6-7.

<sup>73</sup> *Id.* (citing Trial Tr. at 746-47).

of inappropriate conduct on Ms. Young's shift.<sup>74</sup> Again, the testimony offered by Ms. Young in support of this conclusion is that he "had heard some things and seen some things."<sup>75</sup> No follow-up questions were asked as to what "some things" means. Finally, Ms. Young cites the "Overall Findings" from Ms. Ellis' report in an effort to tie up the loose ends left by counsel. (Defendant's Trial Exhibit 8). The Overall Findings states that Mr. Harris expressed concern that: "Adam – touches people, including himself, Charlie, Brad & Cecil. JD asked him to quit, he did not. Bill – Tried to get false sex'l harm't charges filed against JD; over-powers himself." This is not evidence that Mr. Harris was a supervisor when he was aware of this misconduct. Obviously, if it occurred when he was not a supervisor, it is not comparable to Ms. Young's situation. Again, however, counsel absolutely failed to ask Ms. Ellis these basic questions. Nor did counsel – having the burden of proof – call Mr. Harris. The law demands more than a guessing game and Ms. Young's counsel failed to elicit testimony and evidence sufficient to establish – or permit an inference – that Mr. Harris was actually a similarly situated employee. Again, it is for these reasons Judge Recht did not use Mr. Harris as a comparable employee – a decision for which no cross-appeal has been asserted by Ms. Young.

**F. THE ACTUAL EVIDENCE CONTRADICTS PLAINTIFF'S ASSERTION THAT "JOE GRILLI WAS AWARE OF HARASSMENT AND ENGAGED IN INAPPROPRIATE CONDUCT."<sup>76</sup>**

Plaintiff spends four pages arguing – and omitting testimony – that Joe Grilli ignored and engaged in misconduct. In support, Ms. Young cites to Ms. Well's testimony. However, as has already been noted in this reply, Ms. Well testified that Mr. Grilli dealt with problems.<sup>77</sup>

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<sup>74</sup> *Id.* (citing Trial Tr. at 447-448).

<sup>75</sup> Trial Tr. at 448.

<sup>76</sup> Plaintiff's Brief at 7-11.

Plaintiff then partially quotes Ms. Coleman’s testimony to insinuate that Mr. Grilli, in addressing the “dead mouse” situation with Ms. Chipps, acted no differently than Ms. Young. As previously addressed, the plaintiff disingenuously concludes Ms. Coleman’s testimony with a question from Judge Recht, thereby implying that Mr. Grilli’s response was no different than Ms. Young’s. However, as already quoted in this reply, Ms. Coleman’s testimony was that Mr. Grilli addressed the situation and, unlike with Ms. Young, was unaware of any continuing misconduct.

Ms. Young’s brief again misleads this Court by interpreting Ms. Chamber’s testimony to mean that Mr. Grilli did not address sexual harassment complaints. Such a conclusion is simply not supported by Ms. Chamber’s testimony: “Q: How about Mr. Grilli’s response to sexual harassment claims? A: No, I thought he took those pretty seriously.”<sup>78</sup> Consequently, Mr. Grilli’s name is nowhere to be found in Judge Recht’s Order. Not one mention. Judge Recht realized that Mr. Grilli was not a suitable comparison employee because his knowledge and resulting conduct was not the same as Ms. Young’s.

**G. THE ACTUAL EVIDENCE CONTRADICTS PLAINTIFF’S ASSERTION THAT “THE ELLIS INVESTIGATION WAS TARGETED AT LYNDA YOUNG.”<sup>79</sup>**

This assertion is disturbing not only because it misrepresents the evidence, but because it implies that a targeted investigation into a specific employee’s misconduct is wrong.

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<sup>77</sup> Well’s Depo. at 16-18 (“Joe Grilli basically – if you went to him, he would – he’s always tried to help you – Q: Uh-huh A: -- and work everything out. . . Q: Okay. And what did Mr. Grilli do? A: He pulled us all upstairs and yelled at all of us. It was like the first time I ever heard him yell. Q: Okay. Did anybody get suspended? A: No. Q: Did anybody get days off? A: No. Everybody just got told there was no more comments to be made. There was – everything was done and over with. And everything was to be stopped now or there were – if it came down to it, then somebody would get in trouble in everything wasn’t stopped.”).

<sup>78</sup> Trial Tr. at 81 (emphasis supplied).

<sup>79</sup> Plaintiff’s Brief at 11-12.

A key factual error in this section is that “it was only after” Ms. Ellis’ investigation that “Bellofram had any information” that Ms. Young had acted improperly.<sup>80</sup> This claim is outrageous. Ms. Coleman knew – based on Ms. Young’s own admissions to her – that the plaintiff was not only aware of misconduct, but that Ms. Young admittedly ignored it and advised others to do the same. This is obviously evidence that Bellofram knew of misconduct by Ms. Young before hiring Ms. Ellis and, by itself, justified Ms. Young’s termination.<sup>81</sup>

Aside from this absurd claim, this section implies that Ms. Ellis’ investigation was improper because it set out, from the start, to determine if Ms. Young acted inappropriately. Of course the investigation was targeted at her as she was the subject of multiple complaints by her subordinates.

Ms. Young told Ms. Coleman that she ignored this despicable conduct and encouraged others to do the same, and Ms. Ellis – who had no affiliation with Bellofram – was retained as a direct result. Moreover, the testimony is unequivocal that Ms. Ellis – aside from being presented with very basic information by Ms. Kana – was permitted to conduct her investigation as she saw fit without interference from Bellofram.<sup>82</sup> The plaintiff’s position that a targeted investigation is unlawful is without legal support. Is Ms. Young seriously contending that a company – upon receiving specific complaints about an individual – must investigate every single employee in the company? That is untenable and cannot be the law. Rather, it is a clever, but transparent attempt by plaintiff’s counsel at misdirection and obfuscation.

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<sup>80</sup> *Id.* at 11.

<sup>81</sup> *Supra* notes 55, 58 (Ms. Young admitted she heard this offensive language, that she did not act, and that the company’s policy permitted termination).

<sup>82</sup> Trial Tr. at 373, 387.

Finally, whether or not Ms. Ellis did a poor job in investigating the allegations is irrelevant. Her investigation is only relevant insofar as Mr. Colletti, in good faith, believed what Ms. Ellis told him, and whether, as a result of that good faith belief, he made a reasonable decision to terminate Ms. Young. In this case, Ms. Ellis told Mr. Colletti that Ms. Young witnessed racist and sexist misconduct and failed to address it. Based upon this information – and upon the recommendations of three women over 40 – Mr. Colletti made a reasonable decision based on information he believed to be accurate. Even if Ms. Young had made a prima facie case, which she did not, Mr. Colletti’s belief in the accuracy of the Ellis investigation was clearly a valid non-discriminatory reason for her termination. At that point, the law required Ms. Young to provide some evidence that the Ellis investigation was pretextual. It was her burden to show that Mr. Colletti did not actually believe (and rely on) the report, not that its contents were inaccurate.<sup>83</sup> Insofar as her own admissions to Ms. Coleman led to the Ellis investigation, Ms. Young cannot – and did not – meet her burden.

**H. THE ACTUAL EVIDENCE CONTRADICTS PLAINTIFF’S ASSERTION THAT MR. COLLETTI “WAS PREJUDICED AGAINST LYNDA YOUNG.”<sup>84</sup>**

The only alleged evidence of animus on the part of Mr. Colletti is Ms. Young’s testimony that he did not engage in conversation with her.<sup>85</sup> At best this is evidence that Mr. Colletti was

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<sup>83</sup> For example, this Court would be justifiably concerned if half a dozen of its female employees complained that a 60 year old male supervisor was sexually harassing them. This Court would be within its rights to hire an outside human resources investigator and to rely on the investigator’s conclusions in deciding to terminate the male supervisor. Assuming it was later determined that the investigator’s results were wrong, the Court – which in good faith relied on that decision – should not be liable for an age or sex discrimination complaint. *See, e.g., Smith v. Chrysler Corp.*, 155 F.3d 799, 806-07 (6th Cir. 1998).

<sup>84</sup> Plaintiff’s Brief at 12-14.

<sup>85</sup> *Id.* at 13 (quoting Trial Tr. 258-59, 268). However, Ms. Young admitted that she has never had any actual problems with Mr. Colletti and that she has no idea what Mr. Colletti discussed with any male employees. Trial. Tr. at 267-271.

not friends with Ms. Young. However, that is hardly evidence that he did not like her because of her age and sex. After all, Ms. Coleman testified that she had an excellent relationship with Mr. Colletti and that he often hired women over 50 into management positions:

Q: How often do you speak with Mr. Colletti?

A: On a daily basis.

Q: Do you have a good relationship with Mr. Colletti?

A: Yes.

Q: Mr. Colletti ever made any – strike that. How old are you, Sharon?

A: Women is not supposed to tell their age. Fifty.

Q: Mr. Colletti ever done or said anything to you to indicate he had a problem with you being an older woman?

A: No.

Q: Have you ever witnessed Mr. Colletti do or say anything to anyone else that would indicate he had a problem with older women?

A: No, he's actually promoted some since I've been there. We have some women over the age of 50 that have been promoted into supervisory positions, and we've hired some women over the age of 50 into supervisory positions in the past couple years.<sup>86</sup>

Finally, Ms. Young's claim that "Mr. Colletti took adverse action" against her "without any evidence that she had done anything wrong" is a self-serving statement that is clearly erroneous. Ms. Young herself admits she witnessed egregious misconduct, ignored it, and told others to do the same.<sup>87</sup> Even Judge Recht recognized that she failed as a supervisor.<sup>88</sup> The fact

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<sup>86</sup> *Id.* at 677-78. In addition, Mr. Colletti was 53 years old. *Id.* at 711.

<sup>87</sup> *Supra* notes 54, 58. Of course, aside from her own admissions, there is abundant testimony that she knew of – and ignored this misconduct. *Supra* notes 36, 38-40, 42, 45-46, 48, 50-53.

that she now claims that Mr. Colletti lacked proof that “she had done anything wrong” seriously calls into question the credibility of her entire response.

**I. THE ACTUAL EVIDENCE CONTRADICTS PLAINTIFF’S ASSERTION THAT MS. YOUNG WAS “REPLACED BY A YOUNGER MALE SUPERVISOR.”<sup>89</sup>**

Lynda Young cites to rather vague testimony that Joe Ebert, a younger male employee, “eventually” became the second shift supervisor.<sup>90</sup> Apparently, this testimony is meant to imply that Chris Smith – the female over 40 who became second shift supervisor after Ms. Young’s termination – was not really a replacement. The problem, much like the testimony that Mr. Harris knew “some things,” is that it is simply insufficient. The question of what “eventually” meant was is never asked and Judge Recht had no evidence before him as to the time period involved. Obviously, if Chris Smith was the second shift supervisor for a year,<sup>91</sup> the fact that a younger man “eventually,” i.e., fourteen months later, fills the position is hardly proof of discrimination.<sup>92</sup>

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<sup>88</sup> Order at 5 (“Ms. Young’s antidote to the conduct of the three miscreants was indifference” and “At this time, Ms. Young’s response to Mr. Jackson was to ignore the harassment.”)

<sup>89</sup> Plaintiff’s Brief at 14.

<sup>90</sup> Trial Tr. at 612 (“Q: Joe Ebert was eventually hired to take Chris Smith’s place; is that correct? A: Eventually, yes.”)(emphasis supplied).

<sup>91</sup> Indeed, Joe Ebert did not become second shift supervisor until January 5, 2007, more than a year after Ms. Young’s October 25, 2007, termination. Ms. Smith was second shift supervisor from February 2006 until December 2006. She then assumed another supervisory position.

<sup>92</sup> *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1422 (9<sup>th</sup> Cir. 1990) (rejecting age discrimination argument based on a younger employee’s assumption of terminated employee’s responsibilities six or seven months after his termination); *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 941 (6<sup>th</sup> Cir. 1987) (plaintiff’s case weakened where replacement was not until three months after discharge in corporate reorganization case); *Kinnally v. Rogers Corp.*, 2009 U.S. Dist. LEXIS 18385 (D. Ariz. 2009) (“The fact that Defendant hired someone under the age of forty almost a year after the RIF does not raise an inference of discrimination”).

**J. THE ACTUAL EVIDENCE CONTRADICTS PLAINTIFF'S ASSERTION THAT MS. YOUNG'S "SEPARATION FROM HOMER LAUGHLIN WAS INVOLUNTARY."**<sup>93</sup>

The plaintiff states that "All of the evidence presented in this case indicated that Ms. Young left that employment involuntarily."<sup>94</sup> Ms. Young's testimony that she left involuntarily is hardly dispositive. Eric Furbee, Homer Laughlin's human resources manager, testified that personnel records show that Ms. Young "wouldn't work shifts"<sup>95</sup> and "quit without notice."<sup>96</sup> Ms. Young's testimony is not conclusive and her statement that "All the evidence" supports her position is yet another misleading and inaccurate statement.

**III. DISCUSSION OF LAW**

**A. PLAINTIFF'S ARGUMENTS NOTWITHSTANDING, THE EXISTENCE OR NON-EXISTENCE OF PRIMA FACIE CASE IS STILL AT ISSUE EVEN THOUGH A BENCH TRIAL WAS CONDUCTED.**

Ms. Young's argument that *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983), closes the door on any argument that a prima facie was not established at trial is clever, but incorrect. *Aikens* involved a dispute over what actually constituted a prima facie case of race discrimination, not whether the evidence presented to the trial court was sufficient. The lower courts in *Aikens* sought to require additional elements of proof from the plaintiff, and the Supreme Court's decision clarified what elements were required to satisfy a prima facie case.<sup>97</sup>

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<sup>93</sup> Plaintiff's Brief at 15.

<sup>94</sup> *Id.*

<sup>95</sup> Trial Tr. at 625.

<sup>96</sup> *Id.* at 626.

<sup>97</sup> Footnote 11 of *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995), recognized this fact. ("In *Aikens*, the parties on appeal argued whether the district judge, ruling after a bench trial, used the wrong elements for a prima facie case of discriminatory failure to promote.")

*Barefoot* indeed holds, as the plaintiff points out, that “when a trial court has overruled a defendant's motion to direct a verdict for failure to establish a prima facie case and the defendant presented evidence sufficient for the trier of fact to make an adequate ruling on the merits, the question of whether the plaintiff made a prima facie case is not a necessary consideration for the disposition of the case on appeal.”<sup>98</sup> However, in this case, the defendants’ Rule 52(c) motion<sup>99</sup> did not address the issue of whether a prima facie case had been established, but was rather based on Ms. Young’s unambiguous testimony that she actually believed that her termination was related to union involvement by the three “miscreants”<sup>100</sup> and, as a result, whether the case – based on Ms. Young’s own trial testimony<sup>101</sup> - was preempted by federal labor law.<sup>102</sup> Whether Ms. Young had otherwise stated a prima facie case of discrimination was not at issue.

Moreover, this motion was made at the conclusion of the plaintiff’s case and the defendants had yet to present any evidence “sufficient for the trier of fact to make an adequate

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<sup>98</sup> *Id.* (emphasis supplied).

<sup>99</sup> Trial Tr. at 350-352. The plaintiff’s brief erroneously refers to the motion as a Rule 50 motion.

<sup>100</sup> *Id.* at 263-264. (“Q: Lynda, do you believe that your age or sex have anything to do with your termination? A: Yeah, I really do, because - - Q: Why? A: I think Mr. Colletti just decided to sort of make an example out of me, use me as a - - to make a case against these guys on account of the union, and they just fired me to make it look legitimate. They wanted them guys gone, and he fired me with them to make it look like they didn’t just trump it all up against them.”)(emphasis supplied). Amazingly, Ms. Young repeated this belief on cross-examination: “I think that he fired me because they wanted to get those guys that was getting involved with the union, and they wanted to make it look good to where nobody would think it would, so he fired me too.” *Id.* at 330 (emphasis supplied).

<sup>101</sup> Unbelievably – but not unexpectedly – Ms. Young’s response claims that “Ms. Young never asserted or presented any evidence that she was terminated for any conduct connected with union activity. Rather the evidence she presented . . . all pointed toward the Appellants terminating her due to her age and sex.” Plaintiff’s Brief at 38-39. As the preceding footnote makes clear, this is untrue. It is unbelievable that the plaintiff’s response would make such an assertion when her trial testimony plainly says otherwise.

<sup>102</sup> Trial Tr. at 350-352.

ruling on the merits” as required by *Barefoot*. Finally, while *Barefoot* states that whether the plaintiff made a prima facie case is not a “necessary” consideration, it does not preclude this Court from reviewing whether the decision at the trial court level was clearly erroneous.<sup>103</sup> To hold otherwise would allow a judge to ignore the evidence, make a clearly erroneous holding that a prima facie case has been established, and avoid any review. Such a holding would prohibit a remedy in the face of clear error.

**B. PLAINTIFF’S ARGUMENTS NOTWITHSTANDING, THE ACTUAL EVIDENCE, AS OPPOSED TO PLAINTIFF’S CHARACTERIZATIONS OF THAT EVIDENCE, EVEN VIEWED IN A LIGHT MOST FAVORABLE TO HER, FAILS TO ESTABLISH A PRIMA FACIE CASE OF AGE OR GENDER DISCRIMINATION.**

1. **No Evidence of Age Discrimination.** Ms. Young failed to establish a prima facie case of age discrimination. First, and most importantly, Mr. Shuman, the only comparison employee considered by Judge Recht, was also in the protected age class.<sup>104</sup> Thus, Ms. Young failed to offer a comparable employee outside of the age group.<sup>105</sup>

Notwithstanding Ms. Young’s failure to offer a supervisor outside of the protected age class who ignored similar misconduct, the evidence still does not permit the finding that Ms.

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<sup>103</sup> *Barefoot* 193 W. Va. at 484, 457 S.E.2d at 161 (“[w]e can reverse the circuit court only if we find the jury’s decision was unsupported by the evidence.”).

<sup>104</sup> Ms. Young’s reply seems to be that because Mr. Shuman is a man, that this is sufficient to establish her age discrimination claim. Plaintiff’s Brief at 21 (“The fact that Mr. Shuman was over the age of forty cannot be used to rebut Ms. Young’s prima facie case because Mr. Shuman was not a woman over the age of sixty.”) This statement is puzzling. The fact that Mr. Shuman is a man certainly creates an issue for a gender discrimination claim (assuming that the situations faced by both were sufficiently similar). However, the fact that Mr. Shuman was also in the protected age class is evidence that Ms. Young has failed to establish her prima facie age discrimination claim. Certainly Mr. Shuman need not be the same gender as the plaintiff in order for the defendants to rebut her age discrimination claim.

<sup>105</sup> Ms. Young fails in her attempts to utilize Mr. Grilli and Mr. Shuman as comparable employees. Of course, as Judge Recht understood this and did not point to either of them in his Order. Plaintiff can keep insisting that they faced the “same” misconduct, but the evidence makes clear that such assertions require a selective and incomplete reading of the record.

Young established a prima facie case of age discrimination. Ms. Young was promoted at the age of 59.<sup>106</sup> While Ms. Young argues that she was promoted by Mr. Grilli, and thus Mr. Colletti and Bellofram should not get the benefit of that decision,<sup>107</sup> the evidence at trial established that Mr. Colletti has promoted women over the age of 50 into management level positions.<sup>108</sup> The evidence was also undisputed that the decision to fire Ms. Young was made by four individuals over the age of forty.<sup>109</sup> Finally, Ms. Young was replaced by a female over 40.<sup>110</sup>

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<sup>106</sup> See *Lowe v. J.B. Hunt Transp., Inc.*, 963 F.2d 173, 175 (8th Cir. 1992) (affirming dismissal of age discrimination claim because it would be "simply incredible, in light of the weakness of the plaintiff's evidence otherwise, that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later."); *Sanders v. FMAS Corp.*, 180 F. Supp. 2d 698, 702 n.7 (D. Md. 2001) ("Because Plaintiff was hired by Defendant at the age of 47 and was fired just a few months later at the same age, an age discrimination claim against Defendant is unsupportable."); *Kalra v. HSBC Bank United States, N.A.*, 567 F. Supp. 2d 385, 398 (E.D. N.Y. 2008)("[a]ny inference of discrimination is further undermined by the fact that plaintiff, who was sixty-five years old at the time of his hiring, was 'well within the protected class when first hired.')(citing *O'Connor v. Viacom Inc.*, No. 93 Civ. 2399 (LMM), 1996 U.S. Dist. LEXIS 5289, 1996 WL 194299, at \*7 (S.D. N.Y. Apr. 23, 1996)); *Frost v. Petsmart, Inc.*, 2007 U.S. Dist. LEXIS 12909 (E.D. PA. 2007)("The decision makers' membership in the protected class weakens the inference of discrimination."); *Hess v. Sec. Guards, Inc.*, 2003 U.S. Dist. LEXIS 19733 (E.D. PA 2003)("Plaintiff's prima facie case has not been established because he has failed to demonstrate that his termination was in any way motivated by his age. Plaintiff was hired when he was forty-seven years old and was subsequently terminated when he was forty-eight years old."); *Ziegler v. Delaware Cty. Daily Times*, 128 F. Supp. 2d 790, 812 n.47 (E.D. Pa. 2001) (noting that because the decision maker was 53 years old when he terminated the 60-year-old plaintiff's employment, "the inference of discrimination is therefore less since the decision maker was a member of the same protected class as the plaintiff"); *Melnyk v. Adria Labs., Div. of Erbamont Inc.*, 799 F. Supp. 301, 319 (W.D. N.Y. 1992) ("[I]t is difficult to justify a conclusion of age discrimination when [the defendant] hired [the plaintiff] just one year prior to her entry into the protected class.").

<sup>107</sup> Ms. Young offers this Court no legal authority for this position.

<sup>108</sup> Trial Tr. at 677-78 ("Q: Have you ever witnessed Mr. Colletti do or say anything to anyone else that would indicate he had a problem with older women? A: No, he's actually promoted some since I've been there. We have some women over the age of 50 that have been promoted into supervisory positions, and we've hired some women over the age of 50 into supervisory positions in the past couple years.").

<sup>109</sup> See *Richter v. Hook-SupeRx, Inc.*, 142 F.3d 1024, 1032 (7th Cir.1998) ("[t]his Court has found it significant that individuals alleged to have discriminated on the basis of age were themselves members of the protected class.") (citation omitted); *Young v. Hobart West Group*,

**2. No Evidence of Gender Discrimination.** Ms. Young also failed to establish a prima facie case of gender discrimination. There is no evidence that Mr. Shuman was aware of sufficiently similar misconduct, much less that he failed to act.<sup>111</sup> West Virginia law requires a careful and detailed analysis of what constitutes the “same conduct.”<sup>112</sup> None of the testimony

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385 N.J. Super. 448 (2005) (“Courts have found discriminatory intent lacking where the decision-makers are over forty when the employment decision was made.”)

<sup>110</sup> *Hess v. Sec. Guards, Inc.*, 2003 U.S. Dist. LEXIS 19733 (E.D. PA 2003) (“Because Plaintiff was replaced by a person of the same age, there can be no inference of age discrimination.”); *Dedyo v. Baker Eng'g N.Y.*, 1998 U.S. Dist. LEXIS 132, No. 96 Civ. 7152, 1998 WL 9376, at \*6 (S.D.N.Y. Jan 13, 1996) (hiring a member of the protected class undermined any inference of age discrimination).

<sup>111</sup> Trial Tr. at 99 (Mr. Chambers testified that the three miscreants made comments when Mr. Shuman was supervisor, but she was unable to testify about any specific instances. Nor did she ever testify that Mr. Shuman was aware of such conduct). Assuming *arguendo* that the evidence actually shows that specific misconduct that violated the Company’s policies or work rules occurred on Mr. Shuman’s watch, this would still be insufficient in establishing that Mr. Shuman’s situation was sufficiently similar to Ms. Young’s. The key question remains whether Mr. Shuman, like Ms. Young, was actually aware of the misconduct, failed to address it, and was punished less severely. All we truly know is that he was punished less severely, but no evidence was presented as to whether he knew of similar misconduct. It is certainly not fair to compare a supervisor who was unaware of misconduct with one who was fully aware yet failed to act. See *Berquist v. Washington Mutual Bank*, 500 F.3d 344, 353 (5<sup>th</sup> Cir. 2007), *cert. denied*, 128 S. Ct. 1124 (2008); see also *Perez v. Tex. Dep’t of Criminal Justice, Inst. Div.*, 395 F.3d 206, 213 (5<sup>th</sup> Cir.), *cert. denied* 546 U.S. 706 (2005) (citing *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5<sup>th</sup> Cir. 1991) (“We, however, have specifically addressed the plaintiff-employee’s burden of proof in disparate treatment cases involving separate incidents of misconduct and have explained consistently that for employees to be similarly situated those employees’ circumstances, including their misconduct, must have been ‘nearly identical.’”)(emphasis supplied); *Smith v. Wal-Mart Stores*, 891 F.2d 1177, 1180 (5<sup>th</sup> Cir. 1990)); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6<sup>th</sup> Cir. 1994) (“In order for two or more employees to be considered similarly-situated for the purpose of creating an inference of disparate treatment . . . , the plaintiff must prove that all of the relevant aspects of [her] employment situation are ‘nearly identical’ to those of the [male] employees who [she] alleges were treated more favorably. The similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances.”)(emphasis supplied and citation omitted).

<sup>112</sup> *FMC Corp. v. Human Rights Commission*, 184 W. Va. 712,715-16, 403 S.E.2d 729, 732-33 (1991) (in rejecting a complaint that an employee had been the subject of discrimination because she had been punished more severely than employees who had engaged in similar misconduct, this Court noted that “Ms. Frymier’s claim that she was disciplined more severely than other employees who had engaged in “out of plant without permission” behavior, at least

Ms. Young elicited at trial establishes that Mr. Shuman was aware of nearly identical (or even remotely similar) misconduct or that he failed to act in response to racial or sexual harassment. Mr. Shuman testified that he was unaware of racist or sexist misconduct,<sup>113</sup> Mr. Grilli testified that Mr. Shuman was not demoted for permitting such misconduct,<sup>114</sup> and there is no witness testimony that indicates anything to the contrary.<sup>115</sup>

Nor is there evidence that Mr. Grilli or Mr. Harris ignored nearly identical misconduct. The evidence is clear that Mr. Grilli addressed situations and took them seriously.<sup>116</sup> Plaintiff's assertion that female employees flirted with Mr. Grilli<sup>117</sup> is a deceptive attempt to argue that he harassed female employees. The evidence does not support this, and flirting voluntarily initiated by a female employee is hardly comparable to the racist and sexist conduct witnessed and ignored by Ms. Young.

The only evidence regarding Mr. Harris was that at some point he was a supervisor and that he heard "some" things. We still do not know what he knew or heard. We also have no idea whether his knowledge predated his promotion to supervisor. Therefore, as Judge Recht

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with regard to the 16 June 1984 incident, is particularly weak, because her conduct differed from the other absent employees' conduct in one important regard. When confronted about her conduct, she responded with a boldfaced lie, and stuck to it even when she should have realized she was caught in the lie. When other employees who were absent without authorization were confronted, they admitted what they had done. . . .").

<sup>113</sup> Trial Tr. at 63-64.

<sup>114</sup> *Id.* at 607-608.

<sup>115</sup> *Id.* at 607-608, 565-66, 289 (Ms. Young testified that Mr. Shuman "didn't have a clue" about this kind of misconduct); Wells Depo. at 24.

<sup>116</sup> Trial Tr. at 92-93, 96, 686-87, Wells Depo. at 16-18.

<sup>117</sup> The testimony from Ms. Chambers was that the female employees initiated this flirting, and she admitted that there was nothing unwelcome about the conduct. Trial Tr. at 93-94.

realized, he cannot be a comparison employee for purposes of establishing either an age or gender based discrimination claim.

**3. Discipline by Different Supervisors.** The defendants' brief – as well as the briefs submitted by the Union and the Chamber – provide not only extensive case law in support of the position that a court must consider whether the same decision maker took part in the discipline of the comparison employee, but also provides important public policy justifications. Judge Recht's decision effectively tells an employer that they are forever bound by the decisions they have made in the past, whether right or wrong and regardless of whether continuing to make such decisions would expose them to legal liability. Moreover, Judge Recht's decision permits a plaintiff to satisfy his or her prima facie case simply by arguing that the company did things differently in the past, without considering changes in personnel at the management level.

The plaintiff's position lacks legal support. Notably, Ms. Young fails to cite any cases in opposition to those provided by the defendants. Instead, the plaintiff's response cites to those same cases and states that "each case turned on its individual facts and circumstances."<sup>118</sup> This is certainly true, but in each of the cases cited the various courts ruled that, based on that fact that there were different supervisors, the comparison employees were not similarly situated.<sup>119</sup>

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<sup>118</sup> Plaintiff's Brief at 24.

<sup>119</sup> See *Cooper v. City of North Olmstead*, 795 F.2d 1265, 1271 (6<sup>th</sup> Cir. 1986)(reversing trial court's finding of discrimination based upon different punishments imposed for allegedly similar conduct by different supervisors); *Heyward v. Monroe*, 1998 WL 841494, \*2 (4<sup>th</sup> Cir. 1998) ("[i]f different decisionmakers are involved, employees are generally not similarly situated"); *Shumway v. United Parcel Serv.*, 118 F.3d 60, 64 (2<sup>d</sup> Cir. 1997) (employees not similarly situated because they were not supervised by the same person); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6<sup>th</sup> Cir. 1992) ("to be deemed 'similarly-situated', the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor"); *Timms v. Frank*, 953 F.2d 281, 287 (7<sup>th</sup> Cir. 1992) ("it is difficult to say that the difference was more likely than not the result of intentional discrimination when two different decision-makers are involved."); *Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 606 (8<sup>th</sup> Cir. 1983)(different disciplinary measures distinguished because different supervisors were

Plaintiff then cites numerous cases in support of her position that a “bright line test” would “provide employers a virtually impenetrable shield, allowing them to engage in discriminatory or retaliatory conduct simply by having different supervisors involved.”<sup>120</sup> However, the defendants are not asking that an absolute bright line test be adopted. Instead, the defendants ask this Court to recognize that a company offers a legitimate non-discriminatory reason when it shows that the plaintiff and the comparison employee were subjected to employment decisions by different supervisors, and that the burden then rests with the plaintiff to prove that this was pretext for discrimination. If a plaintiff can show that a company is discriminating, yet changing decision makers to avoid legal liability, then certainly recovery can still be permitted. In this case there is no such evidence. Because Judge Recht erred as a matter of law on this point, his decision must be reversed and judgment entered in favor of defendants.

**C. PLAINTIFF’S ARGUMENTS NOTWITHSTANDING, THE ACTUAL EVIDENCE, AS OPPOSED TO PLAINTIFF’S CHARACTERIZATIONS OF THAT EVIDENCE, EVEN VIEWED IN A LIGHT MOST FAVORABLE TO HER, FAILS TO PROVE THE LEGITIMATE NON-DISCRIMINATORY REASONS OFFERED FOR HER DISCHARGE WERE PRETEXTUAL.**

The defendants provided legitimate non-discriminatory reasons for Ms. Young’s termination. First, Ms. Young admitted to Sharon Coleman that she witnessed and ignored

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involved); *Thomas v. Florida Power & Light Co.*, 532 So.2d 1060 (Fla. Ct. App. 1988) (plaintiff not similarly situated to comparative employee where they had different supervisors); *Lynch v. Dean*, 1985 WL 56683 (M.D. Tenn. 1985), *rev’d on other grounds*, 817 F.2d 380 (6<sup>th</sup> Cir. 1987)(proof that plaintiff was disciplined more severely than workers under supervision of another foreman did not aid plaintiff in showing she was victim of discrimination); *Talley v. U.S. Postal Service*, 238 (E.D. Mo. 1982), *aff’d*, 720 F.2d 505 (8th Cir. 1983)(none of employees worked for plaintiff’s supervisor, whose motivation was at issue; therefore, employees to whom plaintiff compared herself were not similarly situated); *Williams v. TWA, Inc.*, 507 F. Supp. 293 (W.D. Mo. 1980), *aff’d in part rev’d in part*, 660 F.2d 1267 (8th Cir. 1981) (evidence of disparate treatment of little probative value where disciplinary measures were imposed by different supervisors).

<sup>120</sup> Plaintiff’s Brief at 23.

serious discriminatory misconduct. Second, she admitted that this response justified termination. Third, Bellofram (and Mr. Colletti) relied on the contents of the Ellis report, which indicated that Ms. Young knew of – and ignored – serious misconduct on her shift. Fourth, the decision to terminate Ms. Young was made by Mr. Colletti, who was not even employed by Bellofram when the decision to demote Mr. Shuman for unrelated conduct was made. These are all legitimate non-discriminatory reasons.

Plaintiff argues that the Ellis report was mere pretext.<sup>121</sup> In support, Ms. Young claims that she was suspended prior to the Ellis investigation “even though there was no evidence at that point” that she had done anything wrong.<sup>122</sup> This is the definition of a “self-serving” claim. Did the plaintiff conveniently forget that she admitted to Ms. Coleman – prior to being suspended – that she had witnessed and ignored this outrageous conduct?

Plaintiff then claims that the Ellis investigation was “skewed in an attempt to amplify” her conduct.<sup>123</sup> Perhaps this is an extension of the plaintiff’s legal theory that a company, upon receiving complaints against a particular employee, must investigate the company’s entire payroll. That is simply not the law and there is nothing impermissible or pretextual about a targeted investigation. The practical implications of ruling otherwise are hard to imagine. In fact, the additional interviews referenced in Ms. Young’s brief could just have easily produced evidence that exonerated her and thus dictated a different response from Bellofram. They did not, as the manifest weight of the evidence makes clear.

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<sup>121</sup> *Id.* at 33.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

Ms. Young states that Bellofram failed to follow its progressive discipline policy. The defendants' brief dealt with this at length.<sup>124</sup> It is worth repeating that not only do the procedures relied upon by Ms. Young not apply to supervisors, but that Ms. Young admitted that the applicable policies permit termination for ignoring the exact conduct she admits to ignoring.<sup>125</sup> Moreover, there is no evidence that these procedures were actually applied to any other supervisors, including Mr. Shuman. In addition, the fact that a company fails to follow its discipline policy is not evidence of discrimination.<sup>126</sup>

Finally, the plaintiff claims that the failure to allow her to return to the bargaining unit is evidence of pretext. However, there is no evidence that she had a right to return to her union position and to require that opportunity would subject Bellofram to discrimination claims by Ms. Chipps, Mr. Jackson, Ms. Wells, Ms. Kirkbride, and countless other employees. The Union makes clear in its brief – and the defendants concur – that not only was there no such right, but that ruling otherwise would create a public policy nightmare. Certainly, the refusal to return a supervisor who condoned such despicable conduct to the union is not pretext.

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<sup>124</sup> Defendants' Brief at 40-45.

<sup>125</sup> Trial Tr. at 283-284 (“Q: And you were also fully aware that, if one of the employees you supervised engaged in this type of behavior, that would violate the plant rules of conduct, right? Ms. Young, would you agree with me that if a company determined that a supervisor was aware of comments and conduct of a sexual, racial, or national origin nature but didn't stop the comments, it would be appropriate to terminate that employee? A: If the supervisor was aware of it or made aware of it, yes.”)

<sup>126</sup> See *Stanojev v. Ebasco Services, Inc.* 643 F.2d 914, 923 (2nd Cir. 1981); *Swiggum v. Ameritech Corp.*, 1999 Ohio App. LEXIS 4634 (Ohio Ct. App. 1999)(An inference of age discrimination does not arise from the fact that an employer does not follow its termination procedures where there is no evidence that the terminated employee was treated less favorably than others on account of his age.)

**D. PLAINTIFF’S ARGUMENTS NOTWITHSTANDING, HER OWN TESTIMONY CAUSES HER CLAIMS TO BE PREEMPTED BY THE NLRA.**

The plaintiff’s response that she “never asserted or presented any evidence that she was terminated for any conduct connected with union activity,” is untrue. Ms. Young absolutely testified that, in her mind, the reason she was fired was not because of her age or her gender, but because Bellofram wanted to get rid of Farmer, Friley, and Lockwood because of their union activities, and terminated her to make the story look legitimate:

A: I think Mr. Colletti just decided to sort of make an example out of me, use me as a - - to make a case against these guys on account of the union, and they just fired me to make it look legitimate. They wanted them guys gone, and he fired me with them to make it look like they didn’t just trump it all up against them.<sup>127</sup>

Just to make clear that Ms. Young actually meant what she said on direct, the defendants’ counsel asked her to confirm this testimony of cross-examination: “I think that he fired me because they wanted to get those guys that was getting involved with the union, and they wanted to make it look good to where nobody would think it would, so he fired me too.”<sup>128</sup>

The very fact that Ms. Young believed that she was terminated to cover up the anti-union animus of the company causes her claim to be preempted by federal law.

**E. PLAINTIFF’S ARGUMENTS NOTWITHSTANDING, HER DEPARTURE FROM HOMER LAUGLIN WAS VOLUNTARY AND THE FAILURE TO REDUCE HER DAMAGES WAS CLEARLY ERRONEOUS.**

Plaintiff claims that “Mr. Furbee’s testimony was completely inconsistent, and unsupported by the evidence,”<sup>129</sup> and that “it is difficult to imagine a witness more utterly

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<sup>127</sup> Trial Tr. at 263-264 (emphasis supplied).

<sup>128</sup> *Id.* at 330 (emphasis supplied)

<sup>129</sup> Plaintiff’s Brief at 40.

discredited than Mr. Furbee was in this case.”<sup>130</sup> Examining the record, however, makes it clear that there was ample evidence that Ms. Young quit her job at Homer Laughlin. Mr. Furbee testified that Homer Laughlin’s records indicate that Ms. Young quit her position because she did not want to work certain shifts.<sup>131</sup> The record also shows that Ms. Young had, when applying to Homer Laughlin, indicated a willingness to work any hours, and that it was determined that she was physically capable of doing so.<sup>132</sup> Nevertheless, Judge Recht erroneously concluded that the plaintiff’s resignation was involuntary.

Judge Recht, in the face of the evidence, also misapplied the law. It was Ms. Young’s duty to mitigate her damages.<sup>133</sup> Her resignation was, as a matter of law, unreasonable.<sup>134</sup> By failing to reduce the damages awarded to the plaintiff, Judge Recht’s erred as a matter of law.

**F. PLAINTIFF’S ARGUMENTS NOTWITHSTANDING, THE FAILURE TO REDUCE ATTORNEYS FEES WAS INAPPROPRIATE**

Ms. Young claims that Judge Recht correctly declined to reduce her attorney fees even though she failed to prevail on three separate causes of action and failed to establish that Grilli

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<sup>130</sup> *Id.* at note 36. The plaintiff makes similar claims about Mr. Jackson (*Id.* at note 2) and claims, without reference, that “Ms. Coleman’s new story collapsed on cross.” (*Id.* at note 30). Apparently the only reliable witness was Ms. Young, who, after admitting at trial that her firing was a anti-union cover up and that she ignored serious racism and sexual harassment, now says in her brief that Mr. Colletti had no evidence of misconduct on her part and that she never testified that she was fired for anything related to the union.

<sup>131</sup> Trial Tr. at 625-26.

<sup>132</sup> *Id.* at 622, 624-25.

<sup>133</sup> Syl. Pt. 2, *Mason County Bd. of Educ. V. State Superintendent of Schools*, 170 W. Va. 632, 295 S.E.2d 719 (1982) (Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area. . .”)

<sup>134</sup> 7 EMP. COORD. EMPLOYMENT PRACTICES § 72:52 (2009)(“Resigning from ‘substantially equivalent’ employment because of personal reasons unrelated to the job, or as a matter of personal convenience, also constitutes a lack of ‘reasonable diligence. . .’”) (internal citations omitted).

was personally liable, dismissing him as a co-defendant at the close of her case.<sup>135</sup> Her logic is that all of these claims were related to her discrimination claims, and therefore it is impossible to delineate what time was spent in pursuit of which of these various causes of action. In other words, she appears to be arguing that there is no distinction between a breach of contract claim that alleges violation of a lifetime employment contract (or, similarly, the violation of company policies) and a claim for gender or age discrimination.

The inaccuracy of this assertion speaks for itself. Without reciting the elements of the various causes of action, it is patently obvious that a breach of contract claim – legally and factually – is different from a gender or age discrimination claim. That being the case, it is unreasonable to assume that the plaintiff’s counsel’s time was all spent on the development and analysis of issues common to all of her different causes of action.

*Heldreth v. Rahimian*<sup>136</sup> makes it clear that the trial court is required to exclude “the hours spent on unsuccessful claims.”<sup>137</sup> Ms. Young was clearly unsuccessful on multiple claims. Despite this fact, Judge Recht awarded attorneys fees based not on those claims that were ultimately successful, but based on all the claims pursued.<sup>138</sup> While certain facts may overlap, contract claims are distinct from discrimination claims. Judge Recht’s refusal to recognize this

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<sup>135</sup> Ms. Young also sued under theories of breach of a supposed lifetime employment claim, breach of contract for failure to comply with company policies regarding discipline, and outrage. None of these claims were ultimately successful.

<sup>136</sup> 219 W. Va. 462, 637 S.E.2d 359 (2006)

<sup>137</sup> *Id.* at 467, 637 S.E.2d at 364.

<sup>138</sup> In addition to \$238,717.78 in lost wages, benefits, and prejudgment interest, the trial court also awarded, in an order entered March 24, 2009, a total of \$172,961.95 in attorney fees, court costs, and litigation expenses. Order, March 24, 2009. The trial court did not reduce the attorney fee award even though the plaintiff failed to prevail on her lifetime employment claim, on her breach of contract claim, and her tort of outrage claim, concluding instead that, “the Plaintiff’s claims involve a common core of facts and are inextricably linked to each claim.” *Id.* at 4-5 (emphasis supplied).

reality and his acceptance of the plaintiff's position that her contract claims were indistinguishable from a discrimination claim was in error.

#### IV. CONCLUSION

Bellofram and Mr. Colletti acted appropriately when presented with evidence – including plaintiff's own admissions – that racial, ethnic, and sexual harassment was occurring under her supervision, that she knew about it, and that she chose to ignore it. There was no evidence before Judge Recht that any other supervisors – whether outside the protected age class or male – knew of such egregious misconduct and failed to act. In fact, the evidence was that Mr. Shuman, the only comparison employee used by Judge Recht, was unaware of similar misconduct.

Certainly, Ms. Young's attorneys were free to ask any of the numerous witnesses who testified, including Ms. Young, whether any of Mr. Shuman's subordinates, in his presence, used the despicable terms "nigger" which appears 23 times in the trial transcript; "sand nigger" which appears 7 times in the trial transcript; "spic" or "spics" which appear 18 times in the trial transcript; "wop" which appears 4 times in the trial transcript; "wetback" or "wetbacks" which appear 6 times in the trial transcript; "whore," "whores," or "ho" which appear 23 times in the trial transcript; and "rat," "rats," or "ratting" which appear 41 times in the trial transcript, all with reference to use by Ms. Young's subordinates while under her supervision.

If, as Ms. Young's lawyers now are trying to convince this Court, Mr. Shuman's circumstances were the same, then why not even ask Ms. Young, who was Mr. Shuman's subordinate and a coworker to Mr. Friley, Mr. Farmer, and Mr. Lockwood, about those alleged similar circumstances?<sup>139</sup>

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<sup>139</sup> Likewise, there was no evidence as to what Mr. Harris knew and whether he was a supervisor at the time, or that Mr. Grilli failed to address problems presented to him, which is why Judge Recht wisely chose not to classify them as comparable employees.

Quite simply, it was Ms. Young's burden to prove through actual evidence that Mr. Shuman's demotion was actually based on the racial, ethnic, and sexual misconduct of his subordinates. Despite having an ample opportunity to make this record, she simply failed to do this. Accordingly, judgment should have been entered for defendants.

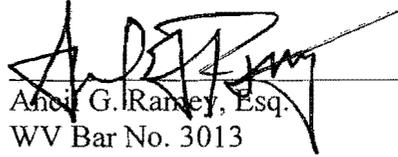
Moreover, instead of commending defendants for taking action to protect their employees, the trial court, while recognizing Ms. Young's inappropriate indifference to serious misconduct, decided that it was better suited to determine the appropriate punishment. In doing so, it ignored Ms. Young's testimony that her termination was related to union activities (and, thus bared by the National Labor Relations Act); ignored the fact that she failed to reasonably mitigate her damages; and declined to properly reduce her attorney fees in light of her failure to prevail on separate and legally and factually distinct claims.

Finally, the trial court's decision, by failing to permit employers to terminate employees who permit racial, sexual, and ethnic harassment simply because an earlier employee was treated differently by different decision makers under different circumstances is contrary to law. As recognized by the Union, the Chamber, and the Manufacturers, any other result would forever bind employers to their past decisions, forcing them to make the unreasonable choice of either getting sued for appropriately firing an employee or exposing themselves to lawsuits by harassed employees who are forced to continue to work side by side with the offending employees.

WHEREFORE, the appellants, Bellofram Corporation and Joseph Colletti, respectfully request that this Court reverse the judgment of the Circuit Court of Ohio County and remand with directions to enter judgment in their favor.

**BELLOFRAM CORPORATION AND  
JOSEPH COLLETTI**

By Counsel

A handwritten signature in black ink, appearing to read 'Ansel G. Ranney', is written over a horizontal line. The signature is stylized and cursive.

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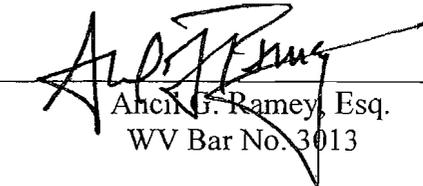
**CERTIFICATE OF SERVICE**

I, Ancil G. Ramey, Esq., do hereby certify that on April 8, 2010, I served the foregoing “Reply Brief of the Appellants” upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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